James Madison to Spencer Roane, September 2, 1819. Transcription: The Writings of James Madison, ed. Gaillard Hunt. New York: G.P. Putnam's Sons, 1900-1910.

TO SPENCER ROANE. MAD. MSS.

Septr. 2; 1819.

Dear Sir I have recd. your favor of the 22d Ult1 inclosing a copy of your observations on the Judgment of the Supreme Court of the U. S. in the case of M'Culloch agst. the State of Maryland; and I have found their latitudinary mode of expounding the Constitution, combated in them with the ability and the force which were to be expected.

1 Roane sent Madison on August 22d. his articles in *The Richmond Inquirer* under the name Algernon Sidney in which he asserted the doctrine of state supremacy. For the full text of the momentous opinion of Chief Justice Marshall see 4 Wheaton, 600.

It appears to me as it does to you that the occasion did not call for the general and abstract doctrine interwoven with the decision of the particular case. I have always supposed that the meaning of a law, and for a like reason, of a Constitution, so far as it depends on Judicial interpretation, was to result from a course of particular decisions, and not these from a previous and abstract comment on the subject. The example in this instance tends to reverse the rule and to forego the illustration to be derived from a series of cases actually occurring for adjudication.

I could have wished also that the Judges had delivered their opinions seriatim. The case was of such magnitude, in the scope given to it, as to call, if any case could do so, for the

views of the subject separately taken by them. This might either by the harmony of their reasoning have produced a greater conviction in the Public mind; or by its discordance have impaired the force of the precedent now ostensibly supported by a unanimous & perfect concurrence in every argument & dictum in the judgment pronounced.

But what is of most importance is the high sanction given to a latitude in expounding the Constitution which seems to break down the landmarks intended by a specification of the Powers of Congress, and to substitute for a definite connection between means and ends, a Legislative discretion as to the former to which no practical limit can be assigned. In the great system of Political Economy having for its general object the national welfare, everything is related immediately or remotely to every other thing; and consequently a Power over any one thing, if not limited by some obvious and precise affinity, may amount to a Power over every other. Ends & means may shift their character at the will & according to the ingenuity

of the Legislative Body. What is an end in one case may be a means in another; nay in the same case, may be either an end or a means at the Legislative option. The British Parliament in collecting a revenue from the commerce of America found no difficulty in calling it either a tax for the regulation of trade, or a regulation of trade with a view to the tax, as it suited the argument or the policy of the moment.

Is there a Legislative power in fact, not expressly prohibited by the Constitution, which might not, according to the doctrine of the Court, be exercised as a means of carrying into effect some specified Power?

Does not the Court also relinquish by their doctrine, all controul on the Legislative exercise of unconstitutional powers? According to that doctrine, the expediency & constitutionality of means for carrying into effect a specified Power are convertible terms; and Congress are admitted to be Judges of the expediency. The Court certainly cannot be so; a question,

the moment it assumes the character of mere expediency or policy, being evidently beyond the reach of Judicial cognizance.

It is true, the Court are disposed to retain a guardianship of the Constitution against legislative encroachments. “Should Congress,” say they, “under the pretext of executing its Powers, pass laws for the accomplishment of objects not entrusted to the Government, it would become the painful duty of this Tribunal to say that such an act was not the law of the land.” But suppose Congress should, as would doubtless happen, pass unconstitutional laws not to accomplish objects not specified in the Constitution, but the same laws as means expedient, convenient or conducive to the accomplishment of objects entrusted to the Government; by what handle could the Court take hold of the case? We are told that it was the policy of the old Government of France to grant monopolies, such as that of Tobacco, in order to create funds in particular hands from which loans could be made to the Public, adequate capitalists not being formed in that Country in the ordinary course of commerce. Were Congress to grant a like monopoly merely to aggrandize those enjoying it, the Court might consistently say, that this not being an object entrusted to the Governt. the grant was unconstitutional and void. Should Congress however grant the monopoly according to the French policy as a means judged by them to be necessary, expedient or conducive to the borrowing of money, which is an object entrusted to them by the Constitution, it seems clear that the Court, adhering to its doctrine, could not interfere without stepping on Legislative ground, to do which they justly disclaim all pretension.

It could not but happen, and was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter; more especially those which divide legislation between the General & local Governments; and that it might require a regular course of practice to liquidate & settle the meaning of some of them. But it was anticipated I believe by few if any of the friends of the Constitution, that a rule of construction would be introduced as broad & as pliant as what has occurred. And those who recollect, and still more those who shared in what passed in the State Conventions, thro' which the people ratified the

Constitution, with respect to the extent of the powers vested in Congress, cannot easily be persuaded that the avowal of such a rule would not have prevented its ratification. It has been the misfortune, if not the reproach, of other nations, that their Govts. have not been freely and deliberately established by themselves. It is the boast of ours that such has been its source and that it can be altered by the same authority only which established it. It is a further boast that a regular mode of making proper alterations has been providently inserted in the Constitution itself. It is anxiously to be wished therefore, that no innovations may take place in other modes, one of which would be a constructive assumption of powers never meant to be granted. If the powers be deficient, the legitimate source of additional ones is always open, and ought to be resorted to.

Much of the error in expounding the Constitution has its origin in the use made of the species of sovereignty implied in the nature of Govt. The specified powers vested

in Congress, it is said, are sovereign powers, and that as such they carry with them an unlimited discretion as to the means of executing them. It may surely be remarked that a limited Govt. may be limited in its sovereignty as well with respect to the means as to the objects of his powers; and that to give an extent to the former, superseding the limits to the latter, is in effect to convert a limited into an unlimited Govt. There is certainly a reasonable medium between expounding the Constitution with the strictness of a penal law, or other ordinary statute, and expounding it with a laxity which may vary its essential character, and encroach on the local sovereignties with wch. it was meant to be reconcilable.

The very existence of these local sovereignties is a controul on the pleas for a constructive amplification of the powers of the General Govt. Within a single State possessing the entire sovereignty, the powers given to the Govt. by the People are understood to extend to all the Acts whether as means or ends required for the welfare of the Community, and falling within the range of just Govt. To withhold from such a Govt. any particular power necessary or useful in itself, would be to deprive the people of the good dependent on its exercise; since the power must be there or not exist at all. In the Govt. of the U. S. the

case is obviously different. In establishing that Govt. the people retained other Govts. capable of exercising such necessary and useful powers as were not to be exercised by the General Govt. No necessary presumption therefore arises from the importance of any particular power in itself, that it has been vested in that Govt. because tho' not vested there, it may exist elsewhere, and the exercise of it elsewhere might be preferred by those who alone had a right to make the distribution. The presumption which ought to be indulged is that any improvement of this distribution sufficiently pointed out by experience would not be withheld.

Altho' I have confined myself to the single question concerning the rule of interpreting the Constitution, I find that my pen has carried me to a length which would not have been permitted by a recollection that my remarks are merely for an eye to which no aspect of the subject is likely to be new. I hasten therefore to conclude with assurances &c &c.